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PRE-APPEAL BRIEF REQUEST FOR REVIEW

Docket Number (Optional)

442005-00105

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on 8/31/2006Signature Typed or printed name David R. Jaglowski

Application Number

10/606,498

Filed

June 26, 2003

First Named Inventor

Clifford D. Bennett, et al.

Art Unit

3637

Examiner

Phi Dieu Tran

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

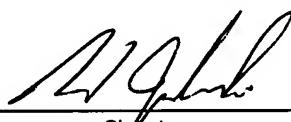
This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).

Note: No more than five (5) pages may be provided.

I am the

- applicant/inventor.
- assignee of record of the entire interest.
See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed.
(Form PTO/SB/96)
- attorney or agent of record.
Registration number _____.
- attorney or agent acting under 37 CFR 1.34.
Registration number if acting under 37 CFR 1.34 58,514



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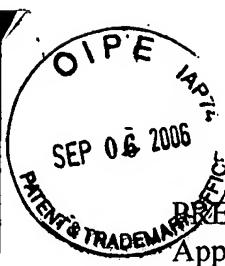
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NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required.
Submit multiple forms if more than one signature is required, see below*.

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This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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RE-APPEAL BRIEF CONFERENCE REMARKS
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Docket No. 442005-00105

Claims 1, 4-8, 10-13, 16-17, 19-24, and 26 are pending in the application. Claims 1, 4-5, 8, 10-13, 17, 19, 22-24, and 26 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Lowery et al. (U.S. Patent No. 6,962,029). Claims 6-7, 16, and 20-21 stand rejected under 35 U.S.C. § 103(a) but will not be discussed in these remarks. The Applicants' claims are set forth in their present form in pp. 2-6 of the Response after Final Action mailed on August 2, 2006.

Rejection of Independent Claims 1 and 17

Claim 1 recites a structure that includes "a receiving area... including at least two pairs of diametrically opposed notches, wherein the two pairs of diametrically opposed notches have different depths..." Claim 17 recites a structure that includes "[a] receiving area including a first and second pair of notches, the second pair being oriented at 90 degrees from the first pair, the first pair of notches being deeper than the second pair of notches..." Both claims include a limitation "wherein each notch comprises a bearing surface defined by a lip extending inwardly from the outer surface such that the bearing surface is cantilevered beyond the inner surface."

In an Office Action mailed May 3, 2006 (hereafter, "Office Action") the Examiner rejected the Applicants' independent claims 1 and 17 over the Lowery et al. reference, stating:

Lowery et al. shows a chair... the receiving area including at least two pairs of diametrically opposed notches (the notches where rebars 35 and 36 go through figure 1), the two pairs of diametrically opposed notches having different depths... each notch comprising a bearing surface (32 figure 3) defined by a lip extending inwardly from the outer surface such that the bearing surface is cantilevered beyond the inner surface... the pairs of notches being oriented at ninety degrees from each other.

The Applicants submit that the rejections are improper under MPEP § 2131, since the Examiner's claim construction is inconsistent and contrary to MPEP § 2111. The Applicants acknowledge that the claims must be given their broadest reasonable interpretation, but such an interpretation must be consistent with the specification, *In re Hyatt*, 211 F.3d 1367, 1372, (Fed. Cir. 2000), and consistent with the interpretation that those skilled in the art would reach, *In re Cortright*, 165 F.3d 1353, 1359 (Fed. Cir. 1999).

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The Examiner is clearly in error in his assertion that Lowery et al. discloses "each notch comprising a bearing surface (32 figure 3)." The Examiner explicitly indicates that the claimed notches are found at "(the notches where rebars 35 and 36 go through figure 1)," yet implicitly revises that finding to incorporate floor member 32 as an element of each notch. Notably, both claims require at least two pairs of notches, "each notch comprising a bearing surface," which requires that the bearing structure must be provided at each notch and not remote from structure that independently defines or includes a notch. Floor member 32 is remote from the notches identified by the Examiner and could be entirely omitted without altering any portion of the cited notches.

In addition, concurrent limitations in the Applicants' claims preclude the Examiner's implicit construction, in that independent claim 1 requires that "the two pairs of diametrically opposed notches have different depths" and independent claim 17 requires that "the first pair of notches [be] deeper than the second pair of notches." If the claimed pairs of notches are construed to include the plainly horizontally disposed floor member 32, then they cannot have different depths and one cannot be deeper than another. The depth of the notch and the notch itself must both exclude floor member 32, since the claim language does not permit the Examiner to parse the extent of each notch in an inconsistent manner. Furthermore, the Examiner's implicit and inclusory construction is plainly contrary to the meaning of the interrelated claim terms "notch," "depth," and "deeper," both as used in the specification and as interpreted in the context of the claims by a hypothetical person of ordinary skill.

The Examiner is also clearly in error in his assertion that floor member 32 constitutes a bearing surface. The plain and ordinary meaning of bearing in the context of a support requires that an element bear the weight of another, and the use of "bearing" as an adjective modifying "surface" excludes the mere transmission of force from an adjoined and attached, as opposed to abutting, element through an element having a surface. The Examiner's construction is plainly contrary to the meaning of the term "bearing surface" both as used in the specification, see

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specification ¶ 0024, and as interpreted by a hypothetical person of ordinary skill, see, e.g., the class and subclass definition for U.S. Patent Subclass 384/2, which is cited only as evidence of a plain and ordinary meaning.

The Examiner is further clearly in error in his implicit assertion that the alleged "bearing surface," floor member 32, is "defined by a lip extending inwardly from the outer surface." Figs. 2, 3, and 6 in the Lowey et al. reference clearly show that floor member 32 constitutes a continuous disc-shaped transverse member adjoining four flexible prongs 28, 29, 30, and 31, such that floor member 32 is axiomatically incapable of providing any sort of "lip" within the plain and ordinary meaning of the term. Simply put, the upper section of the Lowery et al. device resembles a notched cup, and there is no basis for the Examiner's implicit assertion that a hypothetical person of ordinary skill would interpret the claim term "lip" to apply to the continuous floor of such a cup. The Examiner's assertion additionally violates the immediately following limitation "such that the bearing surface is cantilevered beyond the inner surface" in that there is no portion of element 32 that forms an inwardly directed unsupported projection. Again, there is no basis for the Examiner's implicit assertion that a hypothetical person of ordinary skill would describe the continuous floor of a cup, even if suspended rather than resting upon a surface, to be "cantilevered" between the walls of the cup, see, e.g., the subclass definition for U.S. Patent Subclass 52/73, which is cited only as evidence of a plain and ordinary meaning.

For the aforesaid reasons, the Applicants respectfully submit that the Examiner's determination that the Lowery et al. reference discloses a device "wherein each notch comprises a bearing surface defined by a lip extending inwardly from the outer surface such that the bearing surface is cantilevered beyond the inner surface" is clearly erroneous. Since the remaining claims are dependent on independent claims 1 and 17, and the application has been subject to four substantive office actions to date, the Applicants request a finding that the application is allowed on the existing claims.

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Rejection of Dependent Claims 4 and 19

Dependent claim 4 requires that "each of the pairs of notches is connected by a bridge therebetween, the bridge connecting the troughs of the notches." Dependent claim 19 requires that "a bridge extends between each of the pairs of notches, the bridge joining the medial, lowest portions of the notches."

In the Office Action the Examiner rejected the Applicants' dependent claims 4 and 19 over the Lowery et al. reference, stating:

Lowery et al. shows a chair... the receiving area including at least two pairs of diametrically opposed notches (the notches where rebars 35 and 36 go through figure 1), the two pairs of diametrically opposed notches having different depths... each of the at least one pair of notches is connected by a bridge (16, 17a, 18a, 18b) therebetween, the bridges connecting the troughs of the notches... the pairs of notches being oriented at ninety degrees from each other... the bridge joining the medial, lowest portions of the notches.

With reference to the Lowery et al. reference's Figs. 1 and 3, the Applicants note that the cited structures, being arches 15 and 16 and legs 17a,b and 18a,b, constituting the alleged "bridges" intersect the underside of floor member 32, whereas the wire mesh (a.k.a., rebar) is received in structure projecting from the opposite or top side of floor member 32.

The Applicants submit that the rejections are improper under MPEP § 2131, since the Examiner's claim construction continues to be inconsistent and contrary to MPEP § 2111. The Applicants reiterate that if the claimed pairs of notches are construed to include the horizontally disposed floor member 32, then they cannot have different depths and one cannot be deeper than another as required by independent claims 1 and 17, respectively. The depth of the notch and the notch itself must both exclude floor member 32, since the claim language does not permit the Examiner to parse the extent of each notch in an inconsistent manner. Consequently, the Lowery et al. reference cannot disclose that "each of the pairs of notches is connected by a bridge therebetween" and that "a bridge extends between each of the pairs of notches" because the reference does not disclose any structure other than wire holding sections 40, see Fig. 2, that is

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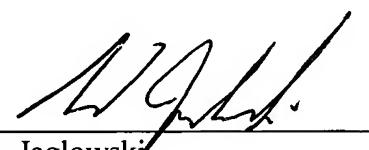
disposed at different heights and/or depths with respect to the device. In order to satisfy both the independent and dependent claim limitations without modification, the Lowery et al. reference must disclose structure that connects to or extends between pairs of notches having different depths and that connects at the specified locations, i.e. "the troughs" as in dependent claim 4 or the "medial, lowest portions" as in dependent claim 19.

For the aforesaid reasons, the Applicants respectfully submit that the Examiner's determination that the Lowery et al. reference discloses a device where "each of the pairs of notches is connected by a bridge therebetween, the bridge connecting the troughs of the notches" or "a bridge extends between each of the pairs of notches, the bridge joining the medial, lowest portions of the notches" is clearly erroneous.

Comment Regarding the Construction of the Claim Term "Notch"

The Examiner has only indirectly indicated the structure considered to constitute a notch. The Applicants respectfully assert that if the Examiner considers the notch element to include the entirety of a notch-containing element or substructure, that this definition is not consistent with the Applicants' specification and not consistent with the interpretation that those skilled in the art would reach, such that the Examiner's determination constitutes clear error.

Respectfully submitted,



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